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No. 91-270

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

CITY OF NEWPORT BEACH, a California City,
Petitioner,

v.

TIMOTHY HAMMER,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

Marion R. Yagman
Stephen Yagman
(Counsel of Record)
Yagman & Yagman, P.C.
723 Ocean Front Walk
Venice, California 90291
(213) 452-3200

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QUESTION PRESENTED

Should this Court review an *en banc* court of appeals decision, upholding a $2,500 verdict against a municipality, that applies the long-standing test of reasonableness to determine whether the forcible seizure of blood from respondent, after he had consented to a breathalyzer test, violated the Fourth Amendment?

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BRIEF IN OPPOSITION

STATEMENT

In June 1985, respondent Timothy Hammer was arrested by police officer Armando Zatarain of petitioner City of Newport Beach for driving under the influence of alcohol. After applying handcuffs, Zatarain told Hammer that he would be required to take one of three chemical tests (blood, breath, or urine) to determine his blood alcohol level. Hammer refused to take any of the tests. App. A2-A3.[1]

Zatarain then transported Hammer to the emergency room at Newport Beach hospital to obtain a blood sample. Upon

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[1] Citations to "App. ___" are to the Appendix to the Petition.

arrival, Zatarain handcuffed Hammer by his right wrist to a hard plastic chair. Approximately five minutes later, the officer again asked respondent if he would submit to a blood test; Hammer again refused. Then, Zatarain told a laboratory technician to withdraw the sample over Hammer's objections. The officer grabbed Hammer's shoulders from behind and held him down while the technician began to swab his left forearm with iodine. Hammer moved when the technician attempted to insert the needle, at which point he and Zatarain, who continued trying to restrain Hammer as Hammer tried to evade the needle, both tumbled sideways onto the floor. Hammer, who was still handcuffed to the chair, twisted his back as he hit the floor. App. A3.

After picking Hammer up off the floor, Zatarain told Hammer that he was going to obtain the sample "the easy way or the hard way." Zatarain then called in two other officers to help him restrain Hammer, and threatened to throw Hammer to the floor and restrain him to obtain the sample. Hammer then stated that he would consent to a breath test "if that's what it's going to come to." Zatarain ignored him, held Hammer down in the chair, and the technician took the sample. App. A3-A4.

Hammer brought this action under 42 U.S.C. § 1983 against petitioner City of Newport Beach, police chief Charles Gross, and Officer Zatarain, alleging that the forcible extraction of blood from him, following his consent to an alternative form of testing, deprived him of rights secured by the Fourth and Fourteenth Amendments to the United States Constitution. App. B1-B2. The complaint sought compensatory damages from all defendants and punitive damages from the individual defendants. App. B4. Following a three-day jury trial and a denial of defendants' motion for a directed verdict, the jury rendered a verdict in favor of Hammer assessing a total of $13,000 of compensatory and punitive damages against the individual defendants and $2,500 in compensatory damages against the City. App. A2; App. A18; App. B2.

On appeal, a panel of the Ninth Circuit reversed, holding that the trial judge erred in denying the defendants' motions for directed verdict and judgment notwithstanding the verdict. *Hammer*

v. Gross, 884 F.2d 1200 (9th Cir. 1989), App. B. In evaluating Hammer's claim that the forcible seizure of his blood was a violation of the Fourth Amendment, the panel employed the "reasonableness" standard first enunciated in *Schmerber v. California*, 384 U.S. 757 (1966), and further explained in *Winston v Lee*, 470 U.S. 753 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989). In so doing, the panel found that the use of force in this case did not render the seizure "unreasonable" because the force used by Zatarain to obtain the sample "was nothing more than the application of physical restraint required to conduct the blood extraction in a safe and efficient manner." 884 F.2d at 1207, App. B18.

The panel declined to evaluate Hammer's claim that the seizure violated his Fourteenth Amendment right to due process in light of this Court's decision in *Graham* that all excessive force claims "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395. Accordingly, the panel's analysis concluded with its finding that the seizure was not "unreasonable" within the meaning of long-standing Fourth Amendment doctrine. 884 F.2d at 1208, app. B19.

The Ninth Circuit ordered rehearing *en banc*. In a six-to-five decision, the court reinstated the jury verdict against the City for compensatory damages. *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991) (*en banc*), App. A. In so doing, the court, like the panel, looked to *Schmerber* to determine whether a rational jury could have found that the seizure of Hammer's blood was "unreasonable" under the Fourth Amendment. As did the panel, it declined to apply a due process analysis to Hammer's claim in light of this Court's decision in *Graham*. 932 F.2d at 845-46, App. A6-A7.

In evaluating Hammer's Fourth Amendment claim, the court "assume[d] for purposes of decision that *Schmerber* does not preclude the use of force in some circumstances to extract blood from a resistant suspect." 932 F.2d at 845, App. A6. The court found, however, that a number of factors, including Zata-

rain's refusal to honor Hammer's consent to undergo a different form of testing, demonstrated that the jury's verdict had a rational basis. With respect to defendants' argument that Hammer's "belated consent" to the breathalyzer test was simply a ploy to create further delay, the plurality stated: "That is possible, but we cannot say that [Hammer's] bad faith was established as a matter of law." 932 F.2d at 846, App. A9. Having reinstated the jury's verdict against the City, the court then held that the individual defendants were entitled to qualified immunity as a matter of law. 932 F.2d at 850, App. A17-A18.

In a concurring opinion, Circuit Judges Kozinski and Nelson agreed with the majority that "[t]he standard, as always under the fourth amendment, is reasonableness," but emphasized that the defendants' failure to offer any explanation for Officer Zatarain's refusal to comply with Hammer's request to undergo a breathalyzer test was sufficient proof, in and of itself, of the unreasonableness of the seizure. 932 F.2d at 852, App. A23-A24. A five-judge dissent also "agree[d] [with the majority] that this case is controlled by *Schmerber* . . ." (932 F.2d at 854, App. A28), but concluded that "there was no evidence from which a reasonable jury could conclude that Officer Zatarain used excessive force." 932 F.2d at 855, App. A30.

REASONS FOR DENYING THE PETITION

Petitioner argues that the decision of the Ninth Circuit applying a reasonableness standard to evaluate the constitutionality of the seizure of Hammer's blood is an impermissable retroactive application of a new constitutional standard. As we explain below, however, the application of a reasonableness standard to evaluate the constitutionality of the forcible seizure of blood from a drunk driving suspect is well grounded in long-standing precedent of this Court and of the Ninth Circuit. In fact, the *en banc* majority's finding that the seizure of blood in this case could rationally be said to have violated the Fourth Amendment reasonableness standard is entirely consistent with this Court's decision in *Schmerber*. Because this case does not involve the application of a new constitutional standard, there is no retroactivity issue before this Court, and review should be denied.

I. The Ninth Circuit Did Not Depart From Established Precedent In Utilizing A Reasonableness Standard.

The three-judge panel and the entire *en banc* court agreed on the applicable rule of law: this case is properly analyzed under the reasonableness standard enunciated by this Court in *Schmerber*. There, this Court held that it was not unreasonable under the Fourth Amendment for police, upon probable cause but without a warrant, to take a blood sample from an arrested, hospitalized suspect who had declined to take a breathalyzer test. 384 U.S. at 771-72. Because the Ninth Circuit utilized the correct legal standard, there is no basis for this Court's review.

Moreover, since *Schmerber* was decided in 1966, this Court has made clear, time and time again, that challenges under the Fourth Amendment should be evaluated under a reasonableness standard. For example, in *Winston v. Lee*, 470 U.S. 753 (1985), *Schmerber* provided the analytic framework for holding that a proposed surgery into the chest muscle of an armed robbery suspect to search for a bullet was unreasonable under the Fourth Amendment. *Id.* at 766. This Court has also invoked *Schmerber* in contexts other than searches entailing an invasion of a suspect's bodily privacy and integrity. *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1984) (*Schmerber* reasonableness approach employed to hold that use of deadly force against unarmed and nondangerous fleeing felon is unreasonable seizure under Fourth Amendment).

The Ninth Circuit has regularly followed suit, applying a reasonableness standard to evaluate Fourth Amendment claims. *See, e.g., Thompson v City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989) (applying reasonableness standard to evaluate § 1983 claim that forcible extraction of blood violated the Fourth Amendment); *Smith v. City of Fontana*, 818 F.2d 1411, 1416 (9th Cir.) (applying reasonableness standard to evaluate § 1983 claim that force used during a personal seizure violated Fourth Amendment), *cert. denied*, 484 U.S. 935 (1987); *Berguist v. City of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986) (applying reasonableness standard to determine, in § 1983 action, whether officers violated Fourth Amendment by destroying property of owners

whose residence was searched due to mistake in warrant); *Ward v. City of San Diego*, 791 F.2d 1329, 1332-33 (9th Cir. 1986) (applying reasonableness standard to § 1983 challenge to constitutionality of a strip search), *cert. denied*, 483 U.S. 1020 (1987); *United States v. Penn*, 647 F.2d 876, 882 (9th Cir.) (*en banc*) (stating that the reasonableness of a search authorized by a valid warrant may be vitiated "by the manner in which the police conducted the search, even if the conduct did not rise to the shocking level of a due process violation"), *cert. denied*, 449 U.S. 903 (1980).

In light of *Schmerber* and its progeny, the Ninth Circuit had no choice but to apply the *Schmerber* reasonableness test to petitioner's Fourth Amendment claim. Because the lower court followed established precedent in utilizing a reasonableness standard to evaluate Officer Zatarain's conduct, the retroactivity issue urged by petitioner is simply not presented in this case. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2443 (1991) ("it is only when the law changes in some respect that an assertion of nonretroactivity may be made").

The Ninth Circuit's citation to this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), as support for its application of a reasonableness standard (*see* 932 F.2d at 845, App. A6) does not indicate otherwise. In *Graham*, which was announced while respondent's case was on appeal to the Ninth Circuit, this Court held that "*all* claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395 (emphasis in original). Contrary to petitioner's claim, *Graham* did not substitute a new standard for evaluating excessive force claims under the Fourth Amendment. As stated above, this Court has *always* utilized a reasonableness analysis in evaluating Fourth Amendment claims. Rather, the effect of *Graham* was to ensure that even those excessive force claims that allege violations of the Fourteenth Amendment or of "some generic 'right' to be free of excessive force" (490 U.S. at 393) are analyzed under the Fourth Amendment reasonableness standard

rather than under the substantive due process approach traditionally applied in the Fourteenth Amendment context. *See* 490 U.S. at 394-95.

Thus, the only effect that *Graham* had on the decision in this case, in which Hammer alleged violations under both the Fourth and Fourteenth Amendments, was to *narrow* the scope of the Ninth's Circuit's analysis to consider only whether the search was "reasonable" within the meaning of the Fourth Amendment. Prior to *Graham*, the Ninth Circuit would likely have conducted separate analyses of Hammer's Fourth and Fourteenth Amendment claims, applying a reasonableness standard to the former and a due process "shock the conscience" analysis to the latter. *See Penn*, 647 F.2d at 880-83; *cf. Schmerber*, 384 U.S. at 759-60, 766-72 (applying due process analysis to claim that seizure violated Fourteenth Amendment and reasonableness analysis to claim that seizure violated Fourth Amendment). *Graham* made clear, however, that only one standard -- that of reasonableness -- need be applied to Fourth and Fourteenth Amendment excessive force claims. Accordingly, and quite correctly, the Ninth Circuit narrowed its review to focus exclusively on the reasonableness of the seizure. Thus, there is no basis for petitioner's claim that, "[i]f *Graham* applies in the *Schmerber* context, it has overruled clear past precedent, changing the 'shock the conscience' due process test to one of objective reasonableness under the Fourth Amendment." Petition at 16.[2]

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[2] We note that the *en banc* majority injected an element of confusion into this case by suggesting, in the context of its discussion of qualified immunity for the individual defendants, that *Graham* did effect a change in the applicable standard and that "[r]easonable officers . . . cannot be required to have anticipated the ruling in *Graham*." 932 F.2d at 850, App. A18. Because *Graham* did not effect a change in the applicable standard, that cannot be a proper basis for the court's finding that the individual defendants are entitled to qualified immunity. That finding, which was against respondent and in favor of petitioner's employees, is not before the Court and accordingly is not a basis for granting review. In any event, a finding that the individual defendants were entitled to qualified immunity does not shield the petitioner from liability. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

II. The Question Of Whether The *En Banc* Court Correctly Applied The Reasonableness Standard To The Unique Facts Of This Case Does Not Warrant Review.

Petitioner's second claim is that review should be granted because the lower court "effectively overruled" *Schmerber* by upholding the jury's finding of unreasonableness here and upholding its $2,500 verdict against the City. Petition at 10. In so arguing, petitioner asks this Court to second-guess the conclusion of a six-to-five *en banc* court that, under the unique facts of this case, the jury rationally determined that the search at issue was unreasonable under the Fourth Amendment. It is clear, however, that even if this Court disagrees with the Ninth Circuit's fact-specific application of *Schmerber*, its ruling on this point, which did not create a split in the circuits, does not raise an issue of sufficient importance to warrant review.

Moreover, the Ninth Circuit's decision is entirely consistent with *Schmerber*, where this Court emphasized that "[Mr. Schmerber] is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'breathalyzer' test petitioner refused." 384 U.S. at 771. In this case, unlike in *Schmerber*, Hammer *did* ultimately state a preference for some other means of testing -- the breathalyzer test -- but this request was ignored. As Circuit Judge Kozinski noted, "[t]he bottom line is that Officer Zatarain acted properly in every respect but one: He failed to give Hammer an alternative test when Hammer consented to it and when (it appears from the record) the alternative was readily available." 932 F.2d at 853. This fact alone readily distinguishes this case from *Schmerber*, and demonstrates the fallacy in petitioner's claim that the lower court "effectively overruled" that decision.

Nor is there any merit to petitioner's suggestion that "Hammer's eleventh-hour concession to take a breathalyzer test is not the 'reasonable request to undergo a different form of testing' which this Court in *Schmerber* said might present a 'different case.'" Petition at 11 (citing *Schmerber*, 384 U.S. at 760 n.4). This argument has no grounding in the federal Constitution.

Rather, the sole basis for this assertion appears to be a California statute which penalizes a driver's refusal to consent to a blood, breath, or urine test with a six-month suspension of his or her driver's license. *See* Calif. Vehicle Code § 13353, App. C. Petitioner's reliance on this statute is misplaced, since it clearly does not authorize the use of force to extract blood following a refusal to consent. Even if it did, "rule[s] of this sort have no bearing on our constitutional analysis; state law cannot render reasonable that which is not." 932 F.2d at 854. Accordingly, there is no basis for petitioner's suggestion that the Ninth Circuit effectively overruled *Schmerber*, and no reason for this Court to grant review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Marion R. Yagman
Stephen Yagman
(Counsel of Record)
Yagman & Yagman, P.C.
723 Ocean Front Walk
Venice, California 90291
(213) 452-3200

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